

DEPARTMENT OF STATE AIRGRAM

REVIEWED BY *W. Hall*DATE *9-30-82*

Department of State

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TOKYO.

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Subject: FCN treaty. Informal discussions. Embassy's despatch No. 98, May 21.

In the present airgram, the Department will limit its observations to the specific points cited in the body of reference despatch, leaving comments on the enclosures to a subsequent airgram.

1. The Japanese proposal set forth on page 3 of enclosure 1, with reference to the special status of certain Korean nationals, is acceptable.

2. As to the point concerning Article VII, paragraph 1 (b), the Department intends an effective right amounting to national treatment in principle, but so phrased as not to be a tight and absolutely rigid national treatment clause. The principle is subject to two major qualifications in later passages of Article VII. First, certain categories of especially sensitive activities are reserved according to the terms of paragraph 2. Secondly, paragraph 3 makes it clear that each Party is free to maintain certain requirements of a technical nature (such as that one or more of the signers of the articles of incorporation or certain of the directors, must be citizens), so long as such deviations from absolute national treatment do not actually impair the substance of the right freely to set up or cause to be set up whatever corporations the citizen might, and to exercise the full direction and control of whatever corporations the citizen investor may control and direct. A requirement that signers of articles of incorporation, or certain directors, must be citizens would not of itself constitute a real interference in the right to organize, control and direct, inasmuch as the majority investors in a corporation, in accordance with business usage, can find citizens who will be loyal to and serve their interests. The Department, therefore, does not concur in the Japanese suggestion, which would materially weaken the treaty in respect of an important establishment right.

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3. Comment deferred.

4a. The Department appreciates the Japanese viewpoint, but would prefer that the two words "allocable" and "apportionable" remain in the English text inasmuch as this language has become standard. It is suggested therefore that the semantic problem involved be treated as merely one of translation.

4b. Article XXI. It is acceptable to change the words "access to courts" to "access to the courts of justice and to administrative tribunals and agencies", although the Department does not regard this change as necessary.

4c. The Department does not perceive any advantage in making the proposed transpositions of the reference to "within the territories of the other Party", and suggests leaving the original word sequence undisturbed. The reference is in each case presently located where it most logically belongs. In Article II (2), the person must obviously be physically present in the territory in order to enjoy the rights specified; the same remark is applicable to III (1); and V (1) the reference is to the location of the courts and agencies there mentioned. The Embassy's line of reasoning with respect to IX (3) is approved, and is regarded by the Department as being applicable equally to the other cases.

Revisions of memos of conversation. The Department notes the revisions reported, and is especially pleased with the correction of the record of the ninth meeting, regarding the discussion of Article XII, as reflected in the two paragraphs quoted at the bottom of page 2, reference despatch.

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